IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.93/2000

State, through Public Prosecutor,
High Court of Bombay at Panaji. .... Appellant.

V/s.

1. Muttappa s/o. late Basappa
Chalwadi,

2. Ashok s/o. Devendra Chalwadi,

3.Devendra alias Gulgulo
s/o. late Chandra Chalwadi,

4. Abdul alias Abbea s/o. Nabisab
Nadaf,

All resident of Kate, Baina,
Vasco, near Faiyaz Bakery. ..... Respondents.

Mr. A.P. Lawande, Public Prosecutor for the State/
Appellant.

Mr. Nitin Sardessai, Advocate for respondent No.1.

Mr. V.A. Lawande, Advocate for respondent No.2.

Mr. P.P. Singh, Advocate for respondents No.3 and 4.

CORAM : P.V. KAKADE &
P.V. HARDAS, JJ.

DATE : DECEMBER 2, 2002.

ORAL JUDGMENT : (Per HARDAS, J.)

The State being aggrieved by the acquittal of the accused/respondents for an offence punishable under Section 302 read with 34 of the Indian Penal Code in Sessions case No.22/1996 by Judgment of the District and

Sessions Judge dated 30.8.2000, has filed the present appeal.

2. The facts, necessary for the decision of the appeal, are set out hereunder :

PW.30, P.I. Aga was attached to Vasco Police Station as Police Inspector and Officer Incharge in May, 1996. Police Constable, Prakash Mandrekar, PW.17 was was attached at that time to Baina Out Post. On 3.5.1996, during night time, when PW.30, PI Aga was on 'bandobast' duty, he received a wireless message from the Duty Officer at Vasco Police Station informing him that a murder had taken place at Baina. On receiving the said information, PW.30, PI Aga rushed to the Vasco Police Station were PW.12 Digambar Naik, the Duty Officer informed him that one Sharma was stabbed to death at Baina. As PW.30 PI Aga was about to leave Vasco Police Station, PW.29 Maruti Mukadam came to the Police Station accompanied by PW.1, Mumtaj Sayed who was the widow of deceased Sharma. PW.30 PI Aga then recorded the complaint of PW.1, which is at Exhibit PW.1/A. Immediately after recording the complaint, PW. 30 PI Aga visited the scene of offence where he saw the dead body of deceased Sharma lying in a shed in front of the shop of one Lobo. The shed was a palm leaves

extension of the shop. PW. 30 PI Aga noticed that one laterite stone was smeared with blood. As it was night time, PW.30 PI Aga was unable to conduct the inquest and scene of offence panchanamas and so he posted guards at the scene of offence. PW. 30 PI Aga therefore, returned back to the Vasco Police Station and sent two police teams to nab the accused. At about 5 a.m. accused No.1 Muttappa and accused No.2 Ashok were produced before him at Vasco Police Station by PW.12 Head Constable Digambar Naik and PW. 25 Police Constable Sebby Fernandes. The said two accused were arrested at about 5.30 p.m. Accused No.3 Devendra was produced before PW.30 PI Aga by PW.25 Police Constable Sebby Fernandes. PW.30 PI Aga executed the arrest panchanama in respect of the arrest of accused Nos.1, 2 and 3 in the presence of panch witness, namely PW.18 Anand Chari and PW.27 Digambar Amonkar. The clothes of the accused also came to be seized and they are Exhibit 15 (MO.19) shirt and Exhibit 16 (MO.20) pant of accused No.1. The clothes of accused No.2 came to be seized and they are exhibit 17 (MO.21) shirt, Exhibit-18 (MO.21) banyan and Exhibit-19 (MO.23) pant of accused No.2. The clothes on the person of accused No.3 also came to be seized and they are Exhibit 13 (MO.17) pant and Exhibit 14 (MO.18) full sleeves shirt of accused No.3. PW.30 PI Aga then conducted the inquest panchanama on of the dead

body in presence of PW.4 Shaikh Ibrahim and another. The said panchanama is at Exhibit 25. The dead body was referred to for post mortem examination to the Hospicio Hospital through PW.24 Dharmesh Angle who was the P.S.I. attached to Vasco Police Station. PW.30 PI Aga then conducted the scene of offence panchanama in the presence of PW.6 Lal Mand and another. The scene of the offence panchanama is at Exhibit 30. From the scene of offence, the blade of the knife (MO.2), wooden handle of the knife (MO.3), full sleeves white shirt (MO.5), the brownish colour chappal of right foot (MO.6), nylon button (MO.8), laterite stone (MO.9), coita without handle (MO.11), a newspaper (MO.12), a pair of black colour leather chappal (MO.10) and G.I. pipe (MO.12) came to be attached. PW.30 PI Aga also prepared the sketch of the scene of offence, which is at Exhibit-75. The clothes of the deceased were produced by PW.24, PSI Angle. The same were attached. Accused No.2 had produced short pant of cream colour. On interrogation, accused No.3 had disclosed that he would point out a danda which he had kept hidden. The disclosure was made in the presence of two panchas, PW.20 Samarjeet Saroj and another. Accused No.3 then led the police and the witnesses to Baina Beach and to the right side of the shed of grocery shop pointed out the danda lying outside that shop. The danda is MO.29 and was attached under

the panchanama Exhibit 58. Accused No.4 was produced by A.S.I. Kerkar PW.28 and was arrested in the presence of PW.10 Balkrishna and another. The clothes on the person of accused No.4, namely shirt (MO.30) and blue colour pant (MO.31) were attached. Exhibit 49 is the panchanama. On 5.5.1996 all the accused were sent for blood groupings and nail clippings with PW.24 PSI Angle. Vide Exhibit 40, the clothes which were seized, were sent for examination of the medical officer. After recording the statements of witnesses, PW.30 PI Aga filed the charge-sheet against the four accused on 20.7.1996.

3. The learned District and Sessions Judge, South Goa at Margao vide Exhibit 6 framed charge against the accused for an offence punishable under Section 302 read with 34 of the Indian Penal Code. The accused abjured their guilt and claimed to be tried. The prosecution, in support of its case, examined 30 witnesses. Incidentally, it may be stated that the examination-in-chief of Pw.1 remained incomplete as, thereafter, PW.1 Mumtaz Sayad , i.e. the widow of the deceased, was not traceable.

4. Mr. A.P. Lawande, the learned Public Prosecutor appearing on behalf of the prosecution has

fairly submitted before us that the pivot of the prosecution case is the evidence of two eye witnesses, namely PW.2 Sudhir Patil and PW.11 Chandsab Dalvayi.

5. PW. 2 Sudhir is a child witness. He states that he knows all the four accused and he also knew the deceased Sharma since last two years. He further states that on 2.5.1995, deceased came to him at about 7 p.m. and requested him to help him. Accused Nos.3 and 4 had come to the bar and deceased Sharma had requested Pw.2 to serve liquor to them. Accused No.3 had asked deceased Sharma as to why he had assaulted his wife and deceased Sharma had thereupon replied that he could go and complain to the police. Thereafter, accused Nos.3 and 4 went away. At about 8.30 p.m. while PW.2 Sudhir was going to answer the call of nature, he saw accused Nos. 3, 4 and accused No.1 conversing with each other and were talking of assaulting deceased Sharma. PW.2 Sudhir thereupon immediately went and informed deceased Sharma and Sharma said that the accused could not do any harm to him. At about 11 p.m., mother of PW.2 Sudhir asked him to bring some water from the tap. The said tap was by the side of the house of deceased Sharma. PW.2 went and brought water and gave it to his mother and returned near the house of Sharma. At about 11.30 p.m., deceased Sharma

told PW.2 Sudhir to bring some chicken and food for him from his house. When PW.2 Sudhir went to bring food, he saw accused Nos.3, 1 and 4 near "Aunty's Gada". PW.2 thereafter went and informed PW.1 Mumtaz, the wife of deceased Sharma about the accused being present near "Aunty's Gada". The wife of deceased Sharma gave food to PW.2 and followed him. On their way, accused No.3 stopped PW.2 and told him not to go to the house of deceased Sharma. PW.2 informed him that he had to give food to deceased Sharma. One Chand who was the friend of the deceased Sharma, had also come there. Accused No.3 asked the said Chand as to why had come and said Chand replied that he had come to answer the call of nature. Accused No.4 assaulted Chand with slaps and fist blows on his stomach and face. There was bleeding through the ear of Chand. Accused No.3 also assaulted Chand. Thereafter, Chand went away. After sometime, Chand and deceased Sharma came back. Deceased Sharma was assaulted with danda and deceased Sharma then started assaulting accused No.3 with said danda. Chand also started assaulting with fists. Accused No.3 snatched the stick (danda), which was in the hand of deceased Sharma and accused No.3 started assaulting the deceased with the said danda. Accused Nos. 4 and 1 also joined and started assaulting deceased Sharma. Accused No.4 caught deceased Sharma by his hands and

thereafter, accused No.1 dealt a knife blow on the stomach of deceased Sharma. Accused No.2 hit a coita on the back of the head of deceased Sharma. Deceased Sharma raised cries for help and on seeing the incident, Pw.2 Sudhir ran away. Deceased had fallen near Lobo's bar.

6. The prosecution has also examined PW.11 Chandsad as the other eye witness. PW.11 Chandsab states that he knows all the accused, as the accused are also residents of Baina, which is in his neighbourhood. He also states that he knew deceased Sharma about 4 to 5 months prior to his murder. PW.11 Chandsab states that on 2.5.1996, he had gone to watch a movie in a theatre from 2 p.m. to 5.30 p.m. and thereafter he had gone for a stroll on the beach and returned at about 6.30 p.m. Thereafter, he went to the room of the hut of the deceased and found that the room was closed. Then he went to another room of the deceased where the deceased used to sell liquor to the sailors. He met the deceased there. At about 7.30 to 7.45 p.m. accused No.3 and accused No.4 came to the said room and accused No.3 gave Rs.20/- to PW.2 Sudhir and asked him to serve him liquor. Accused No.3 then asked the deceased as to why he had assaulted the wife of accused No.3. The deceased replied that he had assaulted her and that accused No.3

could do whatever he wanted and could complain to the police. The deceased also returned Rs.20/- to accused No.3 and asked him to go somewhere else. Then both, accused No.3 and accused No.4 left the room of the deceased. PW.11 Chandsab states that he remained in the room till about 11.30 p.m. as the deceased was serving liquor to various customers. Deceased Sharma then sent PW.2 Sudhir to get food for the deceased and after about 15 minutes, accused No.4 came there and asked PW.11 Chandsab to accompany him for a stroll. While PW.11 Chandsab was going, he saw accused No.3 and PW.1 Mumtaz, wife of the deceased, talking something. Seeing them talking, PW.11 also stopped in order to overhear what they were talking. Accused No.3 and PW.1 Mumtaz came near PW.11 Chandsab and he asked them what the matter was. Accused No.3 gave about 2 to 3 fist blows to PW.11 Chandsab which PW.11 Chandsab returned back to accused No.3. Thereafter, the deceased came running there with a stick in his hand and by that time, accused No.1 had also come there and caught hold of the deceased. Accused No.3 removed the stick from the hands of the deceased and assaulted PW.11 Chandsab on his head, due to which he had a bleeding injury on his left ear. Accused No.4 told PW.11 Chandsab to run away and accordingly, PW.11 Chandsab ran away from the scene of offence and hid himself behind the hut situated at about

15 metres away from the spot. While so hiding himself, PW.11 Chandsab saw accused No.3 assaulting the deceased with the stick on his chest and stomach. Accused Nos.1, 3 and 4 took the deceased while assaulting him to the grocery shop of one Lobo and by that time accused No.2 also reached the scene. Accused No.2 was having a weapon like 'coita' in his hand, with which he gave a blow on the head of the deceased. Then accused No.1 dealt a knife blow on the stomach of the deceased, while accused No.4 was holding the hands of the deceased. The deceased then fell down by the side of the grocery shop. PW.11 Chandsab states that in the morning at about 7 a.m. he left the Village out of fright of the accused and after about 2 months of the incident, the police accompanied by one Basu came to the Village where PW.11 Chandsab was hiding and recorded his statement.

7. The learned trial Court in para 25 of the Judgment has meticulously assessed the evidence of PW.2, Sudhir and PW.11 Chandsab. The learned trial Court in para 25 has observed "I am not at all inclined to accept that the version of PW.11 Chand is that of a truthful witness. On the contrary, I am in serious doubt for the reasons indicated hereinabove, whether PW.11 Chand was at all present". In respect of the evidence of PW.2 Sudhir, learned trial Court has held that PW.2 has not

been consistent, as he has been changing his version from statement to statement. Learned trial Court found that through the evidence of PW.2 Sudhir, the prosecution had not been able to explain the other stab injuries which were inflicted on the deceased. Learned trial Court also found that the injuries on the person of the accused had not been explained by PW.2 Sudhir and, therefore, in para 28, the learned trial Court has this to say about PW.2 Sudhir "In fact, PW.2 Sudhir has been so inconsistent in giving his evidence before the Court, that his evidence gives an impression that either he has deposed out of his imagination, or having been tutored by the police. I am, therefore, not inclined to place reliance on the evidence of PW.2 Sudhir, for the purpose of convicting the accused in a serious offence, for which they stand charged. In other words, the evidence of PW.2 Sudhir does not at all inspire confidence for the purpose of convicting the accused".

8. With the assistance of the learned Public Prosecutor appearing for the State and the learned Counsel appearing for the accused, we have perused the testimonies of PW.2 Sudhir and PW.11 Chandsab. We have noticed that there is no consistency whatsoever in between the evidence of these two eye witnesses. It is true that the testimony of two eye witnesses would never

be identical as the perception and the ability of the memory to retain what was seen and recapitulate it subsequently, may differ from person to person. On peripheral matters the evidence of two eye witnesses is bound to be discrepant. However, what we have noticed in this case is that the inconsistency appears on material aspects of the prosecution case. The learned trial Court has meticulously dealt with the inconsistent versions of both, PW.2, Sudhir and PW.11 Chandsab. We have given our anxious consideration to the reasons advanced by the learned trial Court and we find that the reasonings of the learned trial Court cannot be faulted with. This is an appeal against acquittal and though, the appellate Court has full powers to reappreciate the evidence, the appellate Court would not disturb the findings of acquittal, unless the reasonings given by the Court below for acquitting the accused, are perverse or unsustainable. We have not been able to notice any perversity in the reasonings given by the learned trial Court and, therefore, we see no reason to disturb the findings of acquittal in the present appeal.

9. Therefore, according to us, the learned trial Court was perfectly justified in the face of the discrepant evidence to extend the benefit of doubt and acquit the accused. We see no perversity in the

reasonings of the trial Court, warranting any interference in the appeal against acquittal. The appeal filed by the State is, therefore, devoid of any substance and deserves to be dismissed.

10. Criminal Appeal No.93/2000 is, accordingly, dismissed. The acquittal of the respondents/original accused Nos.1 to 4 as recorded by the learned District and Sessions Judge, South Goa, at Margao in Sessions Case No.22/1996 by his Judgment and Order dated 30.8.2000 is, hereby, confirmed. Bail bonds of the accused stand cancelled.

P.V. KAKADE, J.

P.V. HARDAS, J.

ssm.